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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1954.

No. 351.

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant,

versus

UNITED STATES OF AMERICA

and the

INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana.

MOTION TO AFFIRM.

Now come Arkansas and Louisiana Missouri Railway Company; Chicago, Rock Island and Pacific Railroad Company; Gulf, Colorado and Santa Fe Railway Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Louisiana and Arkansas Railway

Company; Louisiana Southern Railway Company; Louisville and Nashville Railroad Company; Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor; Guy A. Thompson, Trustee, New Iberia & Northern Railroad Company, Debtor; New Orleans and Lower Coast Railroad Company; New Orleans and Northeastern Railroad Company; Guy A. Thompson Trustee, New Orleans, Texas & Mexico Railway Company, Debtor; St. Louis Southwestern Railway Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; Tremont & Gulf Railway Company; New Orleans Terminal Company; and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, intervening defendants and appellees, and, pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment entered on 12 July 1954 by a specially constituted three-judge District Court pursuant to Sections 1336, 2284 and 2321-2325, Title 28 of the United States Code, dismissing the suit of the plaintiffs and intervening plaintiffs to annul, set aside and permanently enjoin enforcement of an order of the Interstate Commerce Commission dated 5 April 1954, entered pursuant to a report dated 5 January 1954, in proceedings under Docket No. 31163, *Louisiana Intrastate Freight Rates and Charges.* Notice of appeal was filed on 11 August 1954.

The question at issue is the validity of the order of the Commission of 5 April 1954 requiring the rail carriers

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to increase their freight rates and charges for Louisiana intrastate traffic to the same extent and in the same manner as they had increased them for interstate traffic to, from and through Louisiana, all as prescribed in its report of 5 January 1954. The report and order in question was issued under Sections 3, 13(4) and 15(a) of the Interstate Commerce Act and is reported at 291 I.C.C. 279.

The Interstate Commerce Commission, in its proceedings Ex Parte No. 168, *Increased Freight Rates 1948,* 272 I.C.C. 695, 276 I.C.C. 9, and Ex Parte No. 175, *Increased Freight Rates 1951,* 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, found the rail carriers operating in southern and southwestern territories (including appellees, intervening defendants) to be in need of increased revenue and authorized increases in freight rates and charges of eight (8%) percent, effective 1 September 1949, and an additional fifteen (15%) percent, effective 28 August 1951, Appellees made application to the Louisiana Public Service Commission, the state regulatory body having jurisdiction, for authority to make corresponding increases in Louisiana intrastate freight rates and charges; this application was substantially denied by reason of the many and important exceptions to that body's permissive orders. Appellees thereupon petitioned the Interstate Commerce Commission to institute an investigation, under Sections 3, 13 and 15(a) of the Interstate Commerce Act, to determine whether the result was not undue discrimination against interstate commerce and/or advantage, preference and prejudice as between Louisiana intrastate shippers and those in interstate commerce.

Formal notice was given and a full hearing had in which all interested parties (and particularly appellants) participated; in due course there was issued a proposed report and, almost a year later, the report of 5 January 1954, with all parties being given full opportunity to protect their interests at all stages by briefs, exceptions, oral argument and petitions for reconsideration, rehearing, etc.

In its report of 5 January 1954, the Commission found that the failure of the Louisiana Commission to authorize increases in intrastate freight rates and charges in Louisiana corresponding to those authorized for interstate commerce to, from and through the State of Louisiana caused discrimination against interstate commerce and that such discrimination should be removed by increasing Louisiana intrastate rates the same percentage as corresponding interstate rates were increased. By order dated 5 April 1954, the Commission denied all of the petitions for rehearing, reargument, etc. and directed the rail carriers to increase their intrastate rates in Louisiana to the same extent and in the same manner that they had increased corresponding interstate rates.

The statute involved is the Interstate Commerce Act, but not only Sections 13(3) and (4) thereof as asserted by appellants (Jurisdictional Statement, p. 3). In particular, Section 15(a) is also involved, directing the Interstate Commerce Commission to give consideration in prescribing rates to a fair return to the carriers in the interest of an adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such

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service. This latter section is of course the basis for action by the Commission in cases of discrimination against interstate commerce generally, or so-called "revenue discrimination," in addition to and as distinguished from the specific discrimination covered by Sectons 13(3) and (4).

> ". . . .The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in 15(a) to be one of the purposes of the bill." *Wisconsin RR Comm. v. C. B. & Q. R. Co.*, 257 U.S. 563, 585, 42 S. Ct. 232, 66 L. Ed. 371.

The three-judge District Court correctly stated the law governing the scope of judicial review of the Commission's order:

> "We take it to be settled law that an order of the Commission is entitled to finality, and may not be set aside, modified or disturbed on judicial review, if such order of the Commission lies within the scope of the Interstate Commerce Statute, and is based upon adequate findings that are supported by substantial evidence." (Appendix to Jurisdictional Statement, p. 27.)

It correctly concluded, from an application of this law to the particular controversy, that the Commission had the statutory authority to make the order in question, that the findings made by it in support of its conclusion were en-

tirely adequate and that these findings were based upon substantial evidence:

> "We hold that the order complained of has a rational basis in adequate findings which are supported by substantial evidence." (Appendix to Jurisdictional Statement, p. 30.)

Appellees submit that it is manifest that the questions on which disposition of this appeal depends are so unsubstantial as not to need further argument. It is submitted that the three-judge Court complied fully with the requisites for review prescribed by this Honorable Court and that there is no basis for appellants' assertion that there was a failure to apply the rules prescribed by or a misapplication of the findings of this Honorable Court in *King v. U. S.*, 344 U.S. 254, 73 S.Ct. 259, 97 L. Ed. 301 and/or *North Carolina v. United States*, 325 U.S. 507, 65 S.Ct. 1260, 89 L. Ed. 1760.

The rule laid down in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456, is that the findings of an administrative agency are not to be set aside where they are:

> ". . .justified by a fair estimate of the worth of the testimony of witnesses or *its informed judgment on matters within its special competence* or both." (340 U.S. 474, at 490; Emphasis added.)

The contention that the three-judge Court failed to consider the record as a whole (Jurisdictional Statement, p. 20) is directly refuted by the Court's statement that:

> "We have considered the entire record, which comprises nearly one thousand pages of testimony and

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> a great number of exhibits . . . ." (Appendix to Jurisdictional Statement, p. 29.)

As to the justification for the Commission's conclusion, the Court said:

> "In reaching its conclusions it was necessary for the Commission to weigh the evidence. That was a function which peculiarly addressed itself to the expertise of the Commission." (Appendix to Jurisdictional Statement, p. 30.)

This is a precise application of your Honors' rule that an administrative Board's decision may be justified by "its informed judgment on matters within its special competence."

It is submitted that the issues to be determined and which were actually determined by the Commission from weighing the evidence were all addressed to its special competence and in the resolution of which it was necessary to exercise its informed judgment. As appears from the appellants' notice of appeal, they involved questions of earning a proper return from intrastate operations, whether the increases prescribed would result in substantial diversion so as to cause loss of revenue, whether the rates on the excepted commodities failed to produce their fair share of revenue and thereby caused a burden upon and unjustly discriminated against interstate commerce, and whether the revenues from Louisiana intrastate operations did not contribute their fair share of revenues required to enable the rail carriers to render adequate and efficient rail service (Jurisdictional State-

ment, pp. 12-15; Amended Jurisdictional Statement, pp. 2-5).

It is obvious that these questions were addressed to the special competence of the Interstate Commerce Commission and your Honors have repeatedly held that the Commission's exercise of its informed judgment in such matters is not subject to review:

> "In effect, we are asked to reexamine the evidence, appraise it, and hold the Commission erred in its judgment as to the facts. We have often said that we have no such power." *Ohio v. United States*, 292 U.S. 498, 506, 54 S. Ct. 792, 78 L. Ed. 1388.

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. . . . . It is not the province of a court to absorb this function to itself. . . . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286-87, 54 S. Ct. 692, 78 L. Ed. 1260.

> "The question of the weight of the evidence was for the Commission and not for the court. . . .In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission." *Florida v. United States*, 292 U.S. 1, 12, 54 S. Ct. 603, 78 L. Ed. 1077.

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"Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts." *Illinois Commerce Commission v. United States,* 292 U.S. 474, 481, 54 S. Ct. 783, 78 L. Ed. 1371.

More recently, your Honors have affirmed decisions of District Courts in which this rule has been precisely followed. *New York v. United States,* 98 F.Supp. 855, affirmed 342 U.S. 882, 911, 72 S. Ct. 152, 301, 96 L. Ed. 662, 681; *State of Illinois v. United States,* 101 F. Supp. 36, affirmed 342 U.S. 930, 72 S. Ct. 377, 96 L. Ed. 693; *Tennessee vs. United States,* 113 F. Supp. 634, affirmed 346 U.S. 891, 74 S. Ct. 222, 98 L. Ed. 148. Further, the issues presented by this appeal are so closely related to those presented and disposed of in *King v. United States, supra,* as not to warrant your consideration. As pointed out by the District Court, the Commission's findings in the two cases are "very similar" and there is no reasonable basis for the suggestion that "the lower court failed to give effect to your Honors' findings in *King v. U. S.,* 344 U.S. 254 and *North Carolina v. U. S.,* 325 U.S. 507," or misapplied them (Jurisdictional Statement, pp. 15, 20; Amended Jurisdictional Statement p. 5), since the District Court pointed out that

". . . The findings which the Court found adequate in the King case were made by the Commission in the instant case, so that the holding in the *North*

Carolina case is not applicable here." (Appendix to Jurisdictional Statement, p. 29.)

Appellees therefore submit that this appeal involves no substantial questions, as it is clear that the Interstate Commerce Commission made and was warranted in making all of the findings requisite to validity of its order, that, in its review, the lower court followed the rules prescribed by your Honors for review of decisions of administrative agencies, and that the lower court reached its conclusion upon a consideration of the record as a whole.

It is respectfully submitted that the judgment and decree of the three-judge District Court should be affirmed.

HARRY McCALL,

(SGD.) HARRY McCALL
Attorney for Rail Carrier Appellees,
1500 National Bank of Commerce Bldg.,
New Orleans 12, La.

William E. Davis,
A. J. Dixon,
J. Barnwell Phelps,
Harold E. Spencer,
Y. D. Lott,
Harry McCall, Jr.,
Robert H. Stahlheber,
Robert Thompson,
Of Counsel.

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CERTIFICATE OF SERVICE.

I, Harry McCall, one of the attorneys for the rail carriers appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ... day of October, 1954, I served copies of the foregoing Motion to Affirm on the several parties thereto as follows:

1. On the State of Louisiana and intervening plaintiffs by mailing copies, duly addressed envelopes, with first-class postage prepaid, to their respective attorneys as follows:

Robert A. Ainsworth, Jr., Attorney for the
Louisiana Public Service Commission,
1650 National Bank of Commerce Building,
New Orleans 12, Louisiana,

Fred S. LeBlanc, Attorney General,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana,

W. Crosby Pegues, Jr., General Counsel,
Department of Highways,
State of Louisiana,
State Capitol,
Baton Rouge, Louisiana,

Paul G. Borron, Jr., Attorney for the
American Sugar Cane League of the U.S.A., Inc.,
Plaquemine, Louisiana,

Louis A. Schwartz, Attorney for the
New Orleans Traffic and Transportation Bureau
and American Turpentine & Tar Company,
611 Gravier Street,
New Orleans, Louisiana.

2. On the United States of America by mailing copies in duly addressed envelopes to George R. Blue, Attorney for the Eastern District of Louisiana, first-class postage prepaid, and to the Solicitor General, Department of Justice, Washington 25, D. C., air mail postage prepaid.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope to Edward M. Reidy, its General Counsel, at the offices of the Commission, Washington 25, D. C.

(SGD.) **HARRY McCALL**

Attorney for Rail Carriers,
1500 National Bank of
Commerce Building,
New Orleans 12, Louisiana.